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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 305

SARAPHIN VOGRIN, PETITIONER,

VS.

A. G. HEDSTROM, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, WITH CERTIFIED RECORD ON APPEAL FILED HEREWITH.

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1) Petitioner prays certiorari to review a judgment of the Court of Appeals for the Eighth Circuit entered April 22, 1955. Motion for rehearing duly and timely filed May 9th, 1955, and overruled May 18, 1955, without opinion.

OPINION BELOW.

2) The U. S. Court of Appeals opinion is reported in 220 F. 2d 863.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

3) Petitioner asserts she was a passenger under the controlling law of California in an automobile of defendant Hedstrom, operated and driven by him on a planned trip from Missouri to the West Coast and return, consisting of Hedstrom and his wife, his wife's brother, and petitioner, when due to his negligence on June 9, 1952, in California she was seriously injured as a result of the automobile leaving the paved U. S. Highway on a curve, running over an embankment, and colliding with a utility pole. Although petitioner stated in her complaint she was a passenger, Hedstrom for the first time at the trial on November 2, 1953, asserted petitioner was a guest and could not recover for "ordinary" negligence because of a California guest statute, and requested at the close of her evidence in chief a motion for a directed verdict to the jury which the U. S. District Court granted on the alleged ground she was a guest under the statute and could not recover, and entered judgment on November 2, 1953, on the verdict in favor of Hedstrom, dismissing the case as to the Insurance Company. Before the trip started on a proposal by Hedstrom an expressed agreement was reached and consummated whereby Hedstrom would use his automobile and petitioner was obligated for one-third of the cost of the "gasoline, oil, greasing and tire repair" on the trip, which was substantial and a tangible benefit to the driver Hedstrom, and a motivating influence for giving the transportation. An appeal was duly and timely taken to the court of appeals on the judgment in favor of Hedstrom and on April 22, 1955, the court of appeals affirmed the judgment of the trial court on the sole ground petitioner, as a matter of law, was a guest and could not

recover because of the guest statute. A certified copy of petitioner's printed record on appeal which is short is filed herewith. May 9, 1955, petition for rehearing was filed and overruled May 18, 1955. This is a diversity of citizenship case as shown in printed record (R. 4, 22). Jurisdiction of this court is invoked under title 28 U. S. C. A., Sections 1254 and 2101 (c) of the judicial code.

CERTIORARI GROUNDS, AND SPECIFICATION OF ERROR.

4) The main point and grounds upon which certiorari is invoked is the failure of the trial court and the court of appeals to heed and follow as controlling the latest rulings and holdings of the Supreme Court of California as the law of California in the case of *Whitmore* v. *French,* 37 Cal. 2d 744, 235 P. 2d 3, a recent case *in banc* decided in 1951, holding, as a matter of law, Whitmore and his wife were passengers and not guests under the California guest statute, where the riders were giving compensation for the ride under an agreement providing for a fifty (50) per cent division of the cost or expenses of a vacation and sightseeing trip from Missouri to the west coast and return which was a motivating influence for furnishing the transportation, and the case of *Harris* v. *Harfmann,* 113 Cal. App. 615, 248 P. 2d 501, decided by the California District Court of Appeals, 2d District, on October 9, 1952, which case interprets and follows the Whitmore case, holding Mrs. Harris was a passenger and not a guest, on a trip involving an agreed division of cost or expenses obligating her only for the cost of gasoline and oil on the trip.

5) It is the contention and position of petitioner that these two cases cannot be distinguished in principle, and

on the facts rule her case, and that she was a passenger under an expressed previous agreement giving compensation for her transportation or ride on an agreed division of cost or expenses, which obligated her for one-third of the cost of gasoline, oil, greasing and tire repairs, and was a motivating influence for furnishing the transportation, and not a guest under the guest statute, and that in not following these cases as controlling California law, petitioner was denied by the Court of Appeals her rights thereunder and a jury trial under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, and *Six Companies of California* v. *Joint Highway*, 311 U. S. 180, 61 S. Ct. 186, which last named case on certiorari reverses the Ninth U. S. Court of Appeals for not following as controlling a California Court of Appeals ruling as to the law of California. Thus the Court of Appeals "has decided an important state question in a way in conflict with the applicable state law of California," calling for an exercise of this court's power of supervision.

6) The California guest statute construed in the *Whitmore* and *Harris cases, supra,* is as follows:

> "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to, or the death of, such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or willful misconduct of said driver."

7) In the submission of the case below, we always contended petitioner was a passenger and not a guest, as the petition and our brief will so show, thus following the designations as used by the Supreme Court of California

when construing the guest statute. We mention this because of the Court of Appeals in the opinion using the phrase "compensating guest." This statute being in derogation of the common law must be strictly construed when it is urged as a bar, as the California Supreme Court has held.

ARGUMENT AMPLIFYING THE REASONS FOR THE ALLOWANCE OF THE WRIT.

8) In *Whitmore* v. *French, Supra,* both Missourians, decided that they and their wives, with French's two sons ages 12 and 14 years would take a trip from Missouri to the west coast, and return, in French's automobile and it was previously agreed that each couple would contribute an equal amount to a common fund out of which all cost or expenses, such as gasoline, oil, meals, lodging, and sightseeing would be paid, each couple putting into a common fund as an initial contribution $100. French did all the driving and Whitmore procured maps and made suggestions as to the route to be followed. An accident in Yosemite National Park, California, occurred while on the trip, injuring Whitmore and his wife while French was driving the car, and Whitmore and his wife brought suit in California, predicated upon "ordinary" negligence of French. They recovered in the trial court and the case was appealed, and the sole ground of defense in the Supreme Court was that Whitmore and his wife were "guests" under the California guest statute and therefore could not recover. The Supreme Court held, as a matter of law, that Whitmore and his wife were passengers and that the guest statute did not bar recovery and affirmed the trial court, the court in an opinion saying:

> "The designations 'passenger' and 'guest' have been adopted for the purpose of distinguishing a per-

son who has given compensation within the meaning of Section 403 of the Vehicle Code from one carried gratuitously. *Kruzie* v. *Sanders*, 23 Cal. 2d 237, 241, 143 P. 2d 704. A person who accepts a ride does not cease to be guest and become a passenger merely by extending customary courtesies of the road, such as paying bridge or ferry tolls (see Rest., Torts, Sec. 490 Comment (a)), and it has been held that the sharing of expense does not destroy the host and guest relationship if nothing more is involved than the exchange of social amenities and reciprocal hospitality. *McCann* v. *Hoffman*, 9 Cal. 2d 279, 70 P. 2d 909. *Where, however, the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. See Kruzie* v. *Sanders*, 23 Cal. 2d 237, 143 P. 2d 704; *Druzanich* v. *Criley*, 19 Cal. 2d 439, 122 P. 2d 53; *Whitechat* v. *Guyette*, 19 Cal. 2d 428, 122 P. 2d 47; *Walker* v. *Adamson*, 9 Cal. 2d 287, 70 P. 2d 914; *Kerstetter* v. *Elfman*, 327 Pa. 17, 192 Atl. 663, 664-666. *This is, of course, true whether the trip is for the joint pleasure of the participants or is of a nonsocial nature.*

In the present case the evidence is without substantial conflict, and in our opinion the trial judge, who the record shows gave careful consideration to the problem, correctly determined that the only reasonable inference that could be drawn from the evidence was that plaintiffs gave compensation for their transportation. It is obvious that something more was involved in the arrangements for the trip than a mere exchange of social amenities, and it cannot be disputed that plaintiffs made a substantial contribution toward the cost of the journey. The financial arrangements were definite and businesslike and resulted in a tangible benefit to defendants, a cash payment was made into the common fund by plaintiffs before the commencement of the journey, and in addition to sharing the cost of the operation of the car and the expenses of the two couples,

plaintiffs obligated themselves to pay one-half the cost of the food, lodging and sightseeing for defendants' two sons on an extended trip which might last two or three weeks. The evidence establishes as a matter of law that plaintiffs *compensated defendants for the ride*, and the requested instructions were, therefore, properly refused.

The judgment is affirmed." (Emphasis ours).

9) In the *Harris case, supra,* the plaintiff and defendant were sisters living in California. In July, 1949, the plaintiff and defendant, their mother, and plaintiff's two small children left California on a trip by automobile to Oklahoma and return. It was agreed that plaintiff was to pay for the "*gasoline and oil,*" and while on the trip an accident occurred, when defendant was driving, her car skidding off the highway and injuring plaintiff and she filed suit for damages in California pleading "ordinary negligence." A jury was waived and the trial court held plaintiff was a guest and could not recover by reason of a guest statute. An appeal was taken by plaintiff and the trial court on October 9, 1952, was reversed and a new trial granted by the court of appeals on the ground plaintiff was not barred by the guest statute, the court saying:

"(1) The recent case of *Whitmore* v. *French,* 37 Cal. 2d 744, 235 P. 2d 3, decided by our Supreme Court in 1951, is controlling here. That case states the rule that where the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. And where one makes a substantial contribution toward the cost of the journey, as a matter of law, he is a passenger and not a guest.

In the Whitmore case two couples on a pleasure trip each contributed to a joint fund out of which expenses for gasoline and oil used in the automobile of one of the couples were paid. It was held that in these circumstances the parties riding in the car were passengers and not guests.

(2) In the case at bar the agreement to pay for gas and oil used on the trip was such a substantial contribution as to make plaintiff a passenger, and the case should have been tried on the theory that defendant was bound to use ordinary care in driving her automobile.

The judgment is reversed, and the cause remanded for a new trial."

Proceedings in Harris Case in California Supreme Court.

10) On October 30, 1952, Harfmann's motion for rehearing was denied. Thereafter Harfmann filed an application for review in the Supreme Court of California, which was permissible, and such was denied by the Supreme Court on December 4, 1952, Edmonds and Schauer dissenting, which two justices dissented in the Whitmore case on the ground it was a jury question as to whether Whitmore and his wife were passengers and not guests. Such shows conclusively the question in issue was considered again by the Supreme Court on the application for review. The State Court report shows the opinion of the court of appeals was concurred in by all the judges. The interpretation by the California Court of Appeals of the Whitmore case certainly should be controlling on the U. S. Court of Appeals, as is also the Whitmore case.

We urge there can be no doubt that the Whitmore case in appiying the tangible benefit and a motivating influence rule as limitations on a pleasure trip show that

the California Supreme Court adopted a more restrictive construction of the word guest in the vehicle code, such before being applied only to business trips. See the late case (1954) of *Thompson* v. *Lacey*, 42 Cal. 2d 443, 267 P. 2d 1. It therefore appears that our Court of Appeals overlooked the change made in the Whitmore case and followed in Harris case as controlling and misconceived the applicable California law.

Record Details of Evidence Pertaining to Transportation.

11) Petitioner's printed record on appeal conclusively shows all the proceedings, pleadings, and all the material and pertinent evidence as to the issues involved on which a decision was reached in the lower courts. Petitioner testified she was given a three weeks annual vacation starting May 30, 1952; that she was planning on taking her father and mother on a vacation to Tacoma, Washington, to visit friends and to find out the distance to Tacoma she called Hedstrom and Hedstrom, finding out what her plans were, said he was ready for a vacation too; that her father knew Hedstrom before she was born and that she had also known the family; that Hedstrom was employed as an engineer at the Kansas City Structural Steel Corporation; that Hedstrom said he would have a two weeks vacation but would have an additional week for making three or four stops for the Steel Company while on the trip; that the trip would include Mrs. Hedstrom and Mrs. Hedstrom's brother, Charles Harling; that Hedstrom said he would take his car and that he had liability and collision insurance. Reference that he had liability and collision insurance was upon objection stricken out (Record pages 8, 9).

12) The record further conclusively shows that the agreement before the trip started with Hedstrom on his proposal expressly obligated petitioner for one-third of the total cost for gasoline, oil, greasing and tire repairs which up to the time of the accident, amounted to $66.82 (having been obtained on his standard oil credit card and charged back to its Kansas City office) as disclosed by an exhibit in the handwriting of Hedstrom itemizing the cost of the four items; that after he came back to Kansas City he with the itemized statement made a written demand on petitioner for $22.27, assessing the same against her as her part for her transportation (which was arrived at as a result of dividing $66.82 by 3) thus showing that your petitioner and Harling were assessed a total of $44.54 and Hedstrom assumed the other $22.27, further showing that his wife was not assessed, and paid nothing (Record pages 10, 11, 7, 16). Hedstrom was not only charging petitioner for the ride but also was charging Harling, and such was not upon a *per capita* basis covering the four in the car. Petitioner and Harling were charged two-thirds. On page 16 of the record petitioner testified "Mr. Hedstrom told me that the charges would be divided into thirds and I accepted it"; that upon starting the trip Hedstrom with his wife and Harling in the car, drove to the residence of petitioner where she entered the car, Hedstrom putting her two bags in the trunk, and they proceeded on the trip on May 30th from Kansas City (Record 12).

Error of the Court of Appeals.

13) The U. S. Court of Appeals, we urge, erred in ruling that the controlling California law was that "the mere showing of expenses among traveling friends on a social trip does not constitute payment of compensation for transportation." For this statement the court cites three

California cases including the Whitmore case, and a Kansas case decided by it on Kansas law which has no application. These three cases do not support the ruling and the court misconceived the issue and facts. *The court fails to mention the Harris case cited in our brief which construes the Whitmore case as we construe it.* The court passed in silence the Harris case which is like the case at bar. The Harris case has never to date been overruled, and, we urge, is controlling on the Federal court as to law of California, and in addition the Supreme Court of California in denying a review of the interpretation by the California Court of Appeals of the Whitmore case approved the court of appeals interpretation of the Whitemore opinion, two of the seven justices dissenting, as they had done in the Whitmore case, solely on the ground that whether Whitmore and his wife were passengers and not guests was a jury question, and not, as the majority held, passengers as a matter of law (see the dissenting opinion). We believe the approval above referred to also gave the Harris case the standing and effect of a Supreme Court decision.

14) The U. S. Court of Appeals in its opinion cast aside not only the Harris case, but also on page 9 of the opinion cast aside and failed to mention the controlling statement of the Supreme Court of California in the Whitmore case following what it quoted in its opinion from this case the following:

> "Where, however, the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence."

15) The majority opinion of the Supreme Court of California held Whitmore and his wife were passengers as

a matter of law, and not barred by the guest statute and the dissent was as above stated predicated solely on the ground this issue was a *jury question*, while the U. S. Court of Appeals *holds as a matter of law* that there was not even a jury question as to whether petitioner in the case at bar was a passenger or a guest. Such ruling we urge was contrary to and contravened the controlling law of California as held in the Whitmore and Harris cases, when even under the dissenting opinion in the Whitmore case petitioner was entitled to a trial by jury.

16) The controlling law of California as announced in the recent cases of Whitmore and Harris, following by more than ten years the McCann and Whitechat cases cited by the court of appeals, are controlling, on the facts of the case at bar, the Whitmore and Harris cases involving an agreed division of cost, holding that a division of expenses did not bar recovery, if such, however, was a tangible benefit to the driver which was a motivating influence for furnishing the transportation. In the McCann cases there was at most only a *tacit* and unexpressed understanding to share expenses. This case is criticized in 26 Calif. L. Rev. 251. The Whitechat case was a *per curiam* opinion and sustained a jury verdict of $8,000.

Here in the case at bar the petitioner under the agreement made before the trip started was obligated for one-third of the cost of the "gasoline, oil, greasing and tire repairs" which one-third up to the time of the accident amounted to $22.11 for her transportation (which was more than her *per capita* share, as four were being transported and a "substantial contribution" to the trip), while in the Harris case, Mrs. Harris was to contribute the cost of the gasoline and oil, the court holding such made her a passenger, and in the Whitmore case there was a division of 50 per cent between the two Whitmores and the

two Frenches of the cost, including Frenches' two sons, and the court held Whitmore and his wife were passengers. In the case at bar Mrs. Hedstrom, like Frenches' sons, contributed nothing.

17) The agreement petitioner made with Hedstrom on his proposal was substantial and much more than the payment of bridge or ferry tolls or social amenities. The proposal made before the trip by Hedstrom resulting in the expressed agreement cannot by any stretch of the imagination be likened to an exchange of social amenities. However, if it can be held such was an exchange of social amenities (which it was not) yet if Hedstrom "received a tangible benefit, monetary or otherwise which was a motivating influence for furnishing the ride, the rider was a passenger and the driver is liable for ordinary negligence" as held in the Whitmore and Harris cases. The crux and deciding issue in the Whitmore and Harris cases as well as in the case at bar was the contribution of a tangible benefit to Hedstrom and a motivating influence for furnishing the ride. Even under the dissenting opinion in the Whitmore case the two dissenters thought such was a jury issue or question.

An Example.

Assume "A" and "B" lawyers friends in Los Angeles had cases in the Supreme Court at Sacramento, set for argument on the same day, and "A" knowing such called "B" and said "I will take you in my car if you will assume the cost of the gasoline," and "B" says "O. K." and goes with "A," would "B" be a guest under the California guest statute? Certainly not.

Side References.

18) The opinion of the court of appeals stresses in cross examination of petitioner, in question and answer form, that they were all just friends on the trip but the counsel for Hedstrom says he "meant you weren't hiring Mr. Hedstrom or his automobile for any purpose" to which she answered, "No," and concluding that the "whole idea was to arrive at some friendly, mutual understanding, of sharing the expenses, isn't that right," to which she answered, "that is right." (R. 15).

19) The opinion then makes references that when defendant later submitted a statement to plaintiff for one-third of the total expenses (at the time of the accident which ended the trip) of the items, amounting to $22.67 against plaintiff, that "she did not pay him," but overlooked her statement as to why she did not pay it then, but later upon objection by counsel defendant being sustained, the matter ended (R. 11).

20) In the face of the admitted agreement as disclosed by the record and the opinion, we believe the stressing of friendship and whether or not she was "hiring" Mr. Hedstrom or his automobile, is of no moment, and should have no place in the opinion. Friends may make a valid agreement, and the matter was not one of "hiring" Hedstrom or his automobile. These side references prove nothing under the California law. The issue under the Vehicle Code was whether or not she *"was giving compensation for such ride."* The "trap" set for petitioner, a woman without legal learning, by the use of the word "hiring" did not fit the case, and was unfair and the court overlooked such, and there is no evidence that she was not giving compensation for the ride within the meaning of the Vehicle Code. This is not a master and servant case. A

person riding on a train or bus does not "hire" the train or bus, or the railroad or bus company.

Urgent Need for Certiorari.

This court in *Meredith et al.* v. *The City of Winterhaven,* 320 U. S. 228, 64 S. Ct. 7, 12, said:

> "*Erie R. Co.* v. *Tompkins, supra,* did not free the Federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state law in all cases within their jurisdiction in which federal law does not govern."

The Facts presented, we urge, entitle this humble woman with injuries to certiorari to the end that she may have a jury trial under the controlling law of the state of California. To her this is a most important case. We think it is the duty of this court to see that petitioner is given a trial under the applicable California law, respondent having removed the case to the Federal Court.

Mandate.

21) Petitioner on May 27, 1955, filed a motion for stay of mandate pending application for certiorari, in which it was stated she intended to apply for Certiorari and prayed she be given to September 12, or such time, as is permissible under the law. On June 2nd a stay (probably by the clerk) was granted for 30 days after June 2, *provided* within such time there was filed with the clerk of the court at St. Louis a certificate of the clerk of this court that a petition for certiorari and record had been filed whereby the stay granted would continue until final disposition of the case. Such we urge, was unreasonable, and petitioner could not arrange to comply with this condition including printing, docket fee, distance from courts

and etc., and providing the money therefor. Further after investigation of the law concluded such requirement was not only contrary to the statute, section 2101, 28 U. S. C. A., page 67, giving 90 days to apply for certiorari, but was also immaterial and contrary to the ruling of this court in *"The Conqueror,"* 166 U. S. 110, 17 S. Ct. 510, and particularly so in view of the nature of the judgment affirmed, which only provided for recovery of costs and execution therefor (R. 4) and will not be paid pending certiorari. However, if material under Rule 3 of the court of appeals the general term will not end until the second Wednesday in September, or September 14, and it may recall the mandate, upon notice of filing the application for Certiorari within 90 days. The rule also provides among other things that any rule inconsistent with a U. S. Statute or rules of this court must be disregarded.

Respectfully submitted,

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Dated August 5, 1955.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 15,183.

Saraphin Vogrin, Appellant,

vs.

A. G. Hedstrom, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

(Opinion.)

[April 22, 1955.]

Charles M. Miller for Appellant.

Sam Mandell (David Trusty and Popham, Thompson, Popham, Mandell, Trusty & Green were with him on the brief), for Appellee.

Before GARDNER, Chief Judge, and WOODROUGH and THOMAS, Circuit Judges.

GARDNER, Chief Judge.

Appellant was plaintiff in an action brought by her against appellee to recover damages for personal injuries

resulting from an automobile accident. As the basis for her cause of action she alleged that on June 9, 1952, at about 4:30 P.M., she was a passenger of defendant Hedstrom sitting and riding in the back seat of a Fordor Buick Sedan automobile owned, operated and driven by the defendant Hedstrom on a public highway of the State of California about ten miles from Reedley, California, when the defendant Hedstrom negligently caused and permitted his automobile to leave the paved portion of the highway for vehicle travel and turn down a high embankment and strike and collide with a large utility pole on the side of the highway causing the automobile to be suddenly stopped and causing plaintiff to be thrown with great force from the back seat against the front seat onto the floor of the automobile seriously and permanently injuring her. She further alleged in some detail the extent and character of the injuries suffered by her and asked judgment for $15,000.00.

The defendant answered challenging the sufficiency of the allegations of the complaint to entitle the plaintiff to any relief, denying that he was guilty of any negligence, and affirmatively alleged that plaintiff was guilty of contributory negligence. The action was tried to the court and a jury and at the close of the plaintiff's evidence defendant moved for a directed verdict on the following grounds:

"1. Plaintiff's petition fails to state a claim upon which any relief can be granted.

"2. Plaintiff's evidence shows that her claim is barred by the applicable statutes of limitations of the State of California.

"3. Plaintiff's evidence shows, as a matter of law, that she was a guest of the defendant Hedstrom, within the

meaning of Section 403 of the Vehicle Code of the State of California, at the time of the casualty in which she was injured, and there is no claim by the plaintiff, and her evidence fails to show, that her injuries proximately resulted from the intoxication or willful misconduct of the defendant Hedstrom, and plaintiff is therefore not entitled to recover in this action."

The court directed a verdict for the defendant pursuant to his motion and from the judgment entered thereon plaintiff prosecutes this appeal and seeks reversal on substantially the following grounds:

1. The court erred in directing a verdict for the defendant on the ground that she was guest within the purview of the California guest statute because plaintiff's allegation that she was a passenger was not denied by defendant in his answer and further the evidence showed that she was a compensating guest.

2. The court erred in striking from plaintiff's testimony the statement of defendant that defendant would take his automobile because he had liability insurance and in refusing plaintiff's offer of proof.

It is the contention of plaintiff that as defendant did not in his answer specifically deny that the plaintiff was a passenger in his automobile at the time of the accident no issue was raised under the California guest statute. Defendant, however, protests that this question was not raised before the lower court and that there was no contention in that court that the defendant had admitted that the plaintiff was a compensating guest. A very careful study of the brief record convinces that this contention was not presented in the trial court. However, plaintiff insists that there was no occasion to present the question in that court and counsel states that he was taken by

surprise that the defendant in his motion for a directed verdict should contend that the right of recovery was barred by reason of the limitations contained in the California guest statute. This claim, we think, cannot fairly be sustained. Counsel for defendant in his opening statement to the jury before any evidence had been introduced by either party among other things stated:

"I think the evidence will show, gentlemen, that there wasn't any arrangement where Miss Vogrin was a passenger for hire as in a taxicab or bus or anything of that nature, and under the California law about which His Honor will instruct you, we believe the evidence will show that she was a guest, and as a guest under that law, has no right to bring this action."

This did not provoke any protest from counsel for the plaintiff nor did he suggest that this was not an issue in the case. Again it is observed that when counsel for plaintiff made his offer of proof with reference to plaintiff's testimony that the defendant said he would take his car because he had liability insurance, counsel for defendant objected as follows:

"That is objected to, Your Honor, as immaterial and as highly prejudicial. The law of California fixes the rights of the parties or fixes the status of the plaintiff as a guest in the car."

Again it will be noted that plaintiff in her testimony offered proof which she contended made her a compensating guest. This testimony, if counsel's present contention is to be given credence, was entirely inconsistent with the theory that there had been a judicial admission that plaintiff was a compensating guest because she had been designated in her complaint as a passenger. Certainly the term "passenger" does not universally connote that

the person so designated is a compensating passenger. Whatever its technical legal significance may be, in common parlance it means an occupant of a motor vehicle other than the person operating it and describes a physical status rather than a technical legal status, 60 C. J. S., Motor Vehicles, pages 975 and 976, and under the California guest statute occupants, however they may be designated, are guests unless they are paying compensation for their transportation. Section 403 California Vehicle Code, Laws 1935, Chapter 27. Manifestly, the question now sought to be urged was not presented to the trial court and hence is not available to plaintiff on this appeal. *Barnard* v. *Wabash R. Co.*, 8 Cir., 208 F.2d 489 and cases there cited.

The only evidence introduced was introduced by the plaintiff and it was directly responsive to the limitations contained in the California guest statute. As has already been noted she introduced evidence as to compensation agreed to be paid by her for her transportation. She, of course, could not be heard to say that the evidence was not addressed to a pertinent issue. Where an issue has in fact been tried even though not made an issue under the pleadings, yet in support of the judgment entered, the pleadings will be presumed to have been amended to conform to the proof. *McAllister* v. *Sloan*, 8 Cir., 81 F.2d 707; *Schmidt* v. *United States*, 8 Cir., 63 F.2d 390; *Ruud* v. *American Packing & Provision Co.*, 9 Cir., 177 F.2d 538; Rule 15(b) Federal Rules of Civil Procedure. Rule 15(b), *supra*, among other things provides that:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and

to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

In *McAllister* v. *Sloan, supra,* which was decided by this court before the adoption of this rule, we said:

"Amendments may be made at any time while the court has jurisdiction, even after judgment; and upon appeal the appellate court may regard a pleading as having been amended to conform to the proof."

In *Schmidt* v. *United States, supra,* also decided before the adoption of Rule 15(b), *supra,* it was said:

"Where the trial court receives evidence without objection, the pleadings will, on appeal, be presumed to have been amended if such amendment is necessary to support the judgment, and this court may presume the pleadings to have been amended to conform to the proof, or will permit an amendment in this court where the record so warrants."

In *Ruud* v. *American Packing & Provision Co., supra,* the Ninth Circuit referring to Rule 15(b), *supra,* said inter alia:

"This modification did not abrogate the contract, and in support of the judgment, if amendment of the pleadings to conform to the proof should have been made, this court will presume that it was so made. Failure to amend will not affect the result of the trial of the issues actually presented. Rule 15(b), Federal Rules of Civil Procedure."

On this issue we conclude that the contention of plaintiff is wholly without merit.

Referring to the contention that the court erred in directing a verdict for the defendant it remains to consider

the argument that in fact plaintiff under the evidence was a compensating passenger. Plaintiff had for a number of years been on very friendly terms socially with defendant and his wife. They had gone on at least one quite extended trip in her automobile. According to her testimony, which is without dispute, she had known the defendant for a long time; they were friends; she was planning to go to the West Coast on a vacation and learning that the defendant was planning a vacation there it was arranged that she was to go along with him, his wife and his brother-in-law and each of them was to pay for their own lodging and meals and that she was to pay one-third of the cost of the gasoline, oil, grease and tire repair. On her cross-examination these questions and answers appear:

"Q. And you were all just comrades and friends on this trip, weren't you?

"A. That is right.

"Q. I mean you weren't hiring Mr. Hedstrom, were you, for any purpose?

"A. No.

"Q. Or hiring his automobile?

"A. No.

"Q. The whole idea was to arrive at some friendly, mutual understanding, of sharing the expenses, isn't that right?

"A. That is right. * * *"

Plaintiff testified that defendant later submitted a statement showing that her one-third of the total expense for those items was $22.27 but that she did not pay him.

The pertinent provisions of the California guest statute read as follows:

"No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such

ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to, or the death of, such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or willful misconduct of said driver."

Under this statute as construed by the Supreme Court of California the mere sharing of expenses among traveling friends on a social trip does not constitute the payment of compensation for transportation. *McCann* v. *Hoffman*, Cal., 70 P.2d 909; *Whitechat* v. *Guyette*, Cal., 122 P.2d 47; *Whitmore* v. *French*, Cal., 235 P.2d 3. See also *Allen* v. *Keck*, 8 Cir., 212 F.2d 425. The Supreme Court of California in *McCann* v. *Hoffman*, *supra*, has left no doubt on this question. It is there said inter alia:

"The great weight of authority is to the effect that the sharing of the cost of gasoline and oil consumed on a trip, when that trip is taken for pleasure or social purposes, is nothing more than the exchange of social amenities and does not transform into a passenger one who without such exchange would be a guest, and consequently is not payment for the transportation or compensation within the meaning of the statute."

Again in *Whitechat* v. *Guyette*, *supra*, the Supreme Court of California said:

"It is equally clear that the benefits of hospitality, companionship or goodfellowship accruing to the owner or operator of an automobile as the result of a simple pleasure trip are not benefits that may be considered compensation. Even if there is something tangible in the way of a contribution of money from the occupant to the driver, a

sharing of expenses, or even in some cases full payment of gas and oil by the occupant, there is no benefit sufficient to be termed compensation if the trip is of a purely social nature."

The California courts have consistently adhered to this doctrine as is evidenced by what is said in *Whitmore* v. *French, supra.* The rule is thus stated:

"A person who accepts a ride does not cease to be a guest and become a passenger merely by extending customary courtesies of the road, such as paying bridge or ferry tolls (see Rest., Torts, Section 490, Comment a), and it has been held that the sharing of expenses does not destroy the host and guest relationship if nothing more is involved than the exchange of social amenities and reciprocal hospitality."

Plaintiff's own testimony conclusively proved that she was not a compensating passenger and hence there was no error in directing a verdict for defendant.

It is however, urged that the court erred in striking from plaintiff's testimony the statement that the defendant would take his car because he had liability insurance. After the statement had been stricken by the court counsel for plaintiff made an offer of proof of the matter stricken and also that plaintiff would not have entered into the agreement without defendant having insurance. The offer of proof was denied. Whether or not the defendant carried liability insurance could have had no bearing on the question as to whether or not the plaintiff at the time of receiving her injuries was a compensating passenger or a mere guest. We are cited to no authority in support of the contention of counsel for plaintiff and we have found none. Being of the view that no prejudicial error was committed by the trial court in the trial of this case the judgment appealed from is affirmed.

(Judgment.)

Monday, November 2, 1953

No. 8153

Saraphin Vogrin, Plaintiff,

vs.

A. G. Hedstrom et al., Defendants.

Parties appear in person and with Counsel. Case called. Parties announce ready. Defendant Farmers Insurance Exchange files motion to dismiss Plaintiff's Petition as to this defendant, or in the alternative for Judgment; said motion is taken with the case. Jury ordered, duly empanelled and sworn and comes as follows:

(12 Jurors named)

Jury list filed. Opening statements made and thereafter plaintiff presents testimony and rests. At the close of plaintiff's testimony the defendant A. G. Hedstrom files motion for directed verdict or for dismissal with prejudice, at the close of plaintiff's evidence: said motion is by the court sustained and the jury at direction of the court returns the following verdict: "We, the jury in the above entitled cause, at the direction of the court find the issues herein in favor of the defendant, A. G. Hedstrom and against the plaintiff, Saraphin Vogrin. Estel J. Michaels Foreman" Verdict filed. Defendant Farmers Insurance Exchange's motion to dismiss plaintiff's Petition as to it, heretofore filed at start of trial and taken under consideration by the court is now sustained.

In accordance with the verdict of the jury in the above entitled cause, herein returned and filed today, it is ordered, adjudged and decreed that the plaintiff take nothing by reason of her complaint but that defendant have and recover of and from the plaintiff his costs herein laid out and expended, and have execution therefor.

CERTIORARI

DENIED